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TERMINATION OF AGENCY BY WAR. — In *Tingley* v. *Mueller*, [1917] 2 Ch. 144, the plaintiff as purchaser of a leasehold brought action for a declaration that an agreement of sale of June 2, 1915, had been dissolved by act of defendant, vendor, in becoming an alien enemy. The defendant, a German by birth and unnaturalized, resided for many years in England. On May 20, 1915, he executed a power of attorney by which he appointed his solicitor, White, his attorney, to sell his house. The power was declared to be irrevocable for twelve months. On May 26 defendant started for Germany by government permit. Under the power of attorney the premises were sold to the plaintiff a week later. The Court of Appeal held that there was sufficient evidence that defendant reached Germany before the sale; that before the sale, therefore, he became "an alien enemy" by residence in Germany; that the power of attorney, having been given by defendant at a time when he was not an alien enemy, being irrevocable, was not terminated by his becoming an alien enemy; that the agreement did not involve any intercourse with the enemy and was not, therefore, within the prohibition of the common law or of the Trading with the Enemy Proclamation, or Acts; and that the plaintiff was not entitled to have the agreement rescinded.

It is unnecessary to discuss the more difficult questions in regard to the irrevocability of a power coupled with an interest.[1] It is sufficient to note, that, if the court rested its decision that the power was irrevocable

[1] See Hunt *v.* Rousmanier's Adm., 8 Wheat. (U. S.) 174; Walsh *v.* Whitcomb, 2 Esp. 565.

upon the ground of the principal and the agent so contracting, its decision is not sanctioned by the American, and probably not by the English, cases.[2] The principal may have the power without the right to revoke. He may be able to prevent the agent involving him with third parties, though he must respond to the agent in damages for breach of contract of employment. And if irrevocability of the power was based on the theory that the interest of the attorney in the commission from the sale of the property rendered it a power coupled with an interest, this part of the decision is also contrary to the American and English authorities.[3]

We reach, then, the question of the effect of war on the existence of a revocable power of attorney. The authorities in the United States hold that a power of attorney given by a resident of one belligerent nation to a resident of an opposing belligerent nation is void because of the intercourse with the enemy involved.[4] If such a power be given before hostilities, or if a power be given between residents of the same country and during war the principal or agent changes his residence to the country of an opposing belligerent, the termination of the power depends according to one line of cases, upon the consent of the parties expressed or presumed.[5] In the absence of express consent if the continuance of the agency is against the interests of the principal the authority is terminated.[6] But if it is for the interest of the principal that the relation continue there is no cessation of the agency.[7] Another line of cases draws distinction between agencies which require communication between the principal and the agent and those which do not. War suspends all intercourse between *residents* (not necessarily between *citizens*) of two opposing belligerent countries, and it is therefore against public policy that the relation should continue after the outbreak of the war, provided it is contemplated in the particular agency that there should be communication between principal and agent. Where no such contemplation exists, however, the agency may continue. On this theory it has been held that agencies to collect debts survive the commencement of the conflict.[8] However, one case at least seems to proceed upon the short ground that war terminates under all circumstances agencies between residents of enemy countries.[9]

Between these conflicting theories it is not difficult to choose. The cessation of agency by war depends not upon the consent of the parties, but upon the broader ground of public policy. That policy forbids all intercourse between residents of opposing belligerent countries. If there

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[2] Chambers *v.* Seay, 73 Ala. 372; Walker *v.* Denison, 86 Ill. 142; Cloe *v.* Rogers, 31 Okla. 255; Blackstone *v.* Buttermore, 53 Pa. 266. See Toppin *v.* Healey, 11 WKLY. REP. 466; MECHEM, AGENCY, 2 ed., § 568.

[3] Taylor *v.* Burns, 203 U. S. 120; Toppin *v.* Healey, 11 WKLY. REP. 466.

[4] Insurance Co. *v.* Davis, 95 U. S. 425.

[5] It is to be noted that under this theory there would never be a revocation until the parties to the relation knew of the outbreak of hostilities.

[6] Insurance Co. *v.* Davis, 95 U. S. 425.

[7] Williams *v.* Paine, 169 U. S. 55, 73, 74 (*semble*); compare Darling *v.* Lewis, 11 Heisk. (Tenn.) 125.

[8] Ward *v.* Smith, 7 Wall. (U. S.) 447; Fisher *v.* Krutz, 9 Kan. 501; Rodgers *v.* Bass, 46 Tex. 505; Robinson *v.* International Life Assur. Soc., 42 N. Y. 54. Compare Denniston *v.* Imbrie, 3 Wash. C. C. 396; Small's Adm. *v.* Lumpkin's Exr., 28 Gratt. (Va.) 832; Shelby *v.* Offutt, 51 Miss. 128; Buchanan *v.* Curry, 19 Johns. (N. Y.) 137. For the law of Germany see 17 COL. L. REV. 660.

[9] Howell *v.* Gordon, 40 Ga. 302.

were revocable agencies which offered by no possibility a necessity of communication between the parties to the relation, the distinction taken by some of the American cases cited above would be sound enough. But such a relation cannot be conceived. There is always the possibility that the principal may desire to revoke his authority, which of course requires communication. Furthermore the agent owes a duty of loyalty which may at any time require him to notify his employer of change in circumstances affecting his powers. The best rule, therefore, is to regard war as, at once and without regard to the knowledge or consent of the parties, terminating the relation.[10]

The Court of Appeal further found that the contract was not within the mischief aimed at in the Trading with the Enemy Proclamation No. 2, dated September 9, 1914, and the acts of Parliament dealing with trade with the enemy, 4 & 5 GEO. V, c. 87 (1914), 5 GEO. V, c. 12 (1914), and 5 & 6 GEO. V, c. 105 (1916).[11] The judges reached this conclusion on the ground that the purchase money when paid to the agent would not be transmitted to the principal in Germany, but would vest in the Public Trustee under Trading with the Enemy Acts of 1914 and 1916. The recent federal legislation approved October 6, 1917, known in this country as the "Trading with the Enemy Act" contains provisions resembling those of the English statutes. Trading with the enemy is declared unlawful and punished severely.[12] The word "enemy" is defined in section 2 (*a*) as "any individual . . . resident within the territory . . . of any nation with which the United States is at war." The words "to trade" are defined among other things to mean in section 2 (*c*) "enter into, carry on, complete, or perform any contract. . . ." And the prohibition of section 3 renders it unlawful "to trade . . . with, to, or from, or for, or on account of, or on behalf of, or for the benefit of, any other person, with knowledge, or reasonable cause to believe that such other person is an enemy. . . ." This legislation, as well as the English legislation, would seem to render invalid the agent's contract in *Tingley*

[10] BATY AND MORGAN, WAR: ITS CONDUCT AND LEGAL RESULTS. London, 1915, 273. And see a decision of Conseil de Revision de Lyon, July 31, 1916; CLUNET, JOURNAL DU DROIT INTERNATIONAL, vol. 44, 166.

[11] The material portions of this legislation for present purpose are contained in the Trading with the Enemy Proclamation No. 2, dated September 9, 1914, in which, after reciting (*inter alia*) that "it is contrary to law for any person resident, carrying on business or being in Our Dominions, to trade or have any commercial or financial transactions with any person resident or carrying on business in the German Empire or Austria-Hungary without Our permission," it is declared (*inter alia*) as follows:

Par. 3: "The expression 'enemy' in this Proclamation means any person or body of persons of whatever nationality resident or carrying on business in the enemy country, but does not include persons of enemy nationality who are neither resident nor carrying on business in the enemy country. . . ."

Par. 5: ". . . We do hereby accordingly warn all persons resident, carrying on business or being in Our Dominions —

"(1) Not to pay any sum of money to or for the benefit of an enemy.

. . . . . .

"(9) Not to enter into any commercial, financial or other contract or obligation with or for the benefit of an enemy.

. . . . . .

". . . whoever in contravention of the law shall commit, aid, or abet any of the aforesaid acts, is guilty of a crime . . ."

[12] Sections 3, 16.

v. *Muller*. It might be argued that as the property of an alien enemy is taken from him and vested in the alien property custodian,[13] that a contract made by an agent in his name is not a contract on behalf of him or for his benefit, but for the benefit of the government. But this is not true in either country, for the property is not permanently taken from the enemy, but merely held for him during the war, and then disposed of as Congress [14] or the King by Order in Council may direct.[15] The alien enemy may or may not receive a penny of it.

The principal case should, therefore, be decided differently if considered solely from the point of view of war legislation in either the United States or in England.

EFFECT OF WAR ON CONTRACTS. — War between states rather than between their subjects, as set forth in Rousseau's "athletic-contest" theory of belligerency,[1] never seemed farther from reality than in the present war, so emphatically a struggle between peoples rather than between princes. In such a contest, whatever may be the amelioration of military practices, the old restrictions upon commercial intercourse persist with undiminished rigor. The most significant effects of war upon contracts are seen in its intrusion as an intervening circumstance making performance impossible, in its prohibition of trading and negotiating with enemies, in its postponing the remedy on executed contracts, and in its suspending or dissolving executory contracts.[2]

The strict rule of the common law is that subsequent impossibility does not dissolve an express unconditional contract.[3] The law, however, mitigates this harsh doctrine by recognizing implied conditions in many contracts where the contrary intention does not clearly appear in the contract.[4] It is a good defense if performance is made illegal by domestic law,[5] but, it seems, not if foreign law prohibits.[6] It has been held that a

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[13] United States Trading with the Enemy Act, 1917, § 6; 5 GEO. V, c. 12.

[14] Act of 1917, § 12.

[15] 5 GEO. V, c. 12, § 5.

[1] See ROUSSEAU, DU CONTRAT SOCIAL, l. 1, c. iv; BORDWELL, LAW OF WAR BETWEEN BELLIGERENTS, 3.

[2] See TROTTER, LAW OF CONTRACT DURING WAR, 6.

[3] Paradine *v.* Jane, Aleyn, 26 (1647). See WALD'S POLLOCK, CONTRACTS, 3 (WILLISTON'S) ed., 527.

[4] Horlock *v.* Beal, [1916] 1 A. C. 486. Lord Wrenbury, 525, makes this statement of the law: "When a contract has been entered into, and by a supervening cause beyond the control of either party, its performance has become impossible, I take the law to be as follows: If a party has expressly contracted to do a lawful act, come what will — if, in other words, he has taken upon himself the risk of such a supervening cause — he is liable if it occurs, because by the very hypothesis he has contracted to be liable. But if he has not expressly so contracted, and from the nature of the contract it appears that the parties from the first must have known that its fulfilment would become impossible if such a supervening cause occurred, then upon such a cause occurring both parties are excused from performance. In that case a condition is implied that if performance becomes impossible the contract shall not remain binding." *Cf.* Tamplin S. S. Co. *v.* Anglo-Mexican, etc. Co., [1916] 2 A. C. 397.

[5] Chicago, etc. Ry. *v.* Hoyt, 149 U. S. 1 (1892); Taylor *v.* Caldwell, 3 B. & S. 826 (1863); *In re* Shipton, Anderson & Co., [1915] 3 K. B. 676.

[6] Tweedie, etc. Co. *v.* J. P. McDonald Co., 114 Fed. 985 (1902).